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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

WAYNE BARBER et al., Plaintiffs and Respondents, v. ROBERT MENDOZA et al., Defendants and Appellants.	B208334 (Los Angeles County Super. Ct. No. NC039488)

APPEAL from an order of the Superior Court of Los Angeles County. Deanne Smith-Meyers, Judge. Vacated with directions.

Law Office of Lloyd K. Chapman and Lloyd K. Chapman for Defendants and Appellants.

Wayne Barber and Christine Barber, in pro. per., for Plaintiffs and Respondents.

Defendants Robert and Kay Mendoza appeal the trial court's denial of their motion to set aside the default entered against them.

The underlying facts, as set forth in the complaint, are these: Plaintiffs Wayne and Christine Barber leased commercial space (the "Property") in Long Beach from defendants, for the purpose of operating a flower shop. The term of the lease was one year, commencing on April 1, 2005, with a monthly rent of $3,700.

Shortly after taking possession, plaintiffs learned that the City of Long Beach had issued a Notice to Clean the Property of weeds and debris, and a Notice to Abate and Remove from the Property three inoperative vehicles as a public nuisance. Plaintiffs forwarded copies of these notices to defendants.

On March 14, 2005, Plaintiffs applied to the City of Long Beach for a business license; a conditional license was issued on April 12, 2005, pending inspection of the Property by Planning and Building and Fire Departments. Upon inspection by the Fire Department, the inspector declared the Property a fire hazard requiring the following remediations: Provision of Property address visible from street with contrasting background; the removal of extension wires which were being used as permanent wiring; the provision of a sign over the front door to read: "This door to remain unlocked during business hours;" and the removal of storage under the staircase "or provide 1-hr protection/ 5/8"-type gyp. board." Plaintiffs forwarded a copy of the inspection notice to the defendants with the request that the cited repairs be made. "Despite their promises to make such repairs, Defendants Robert Mendoza and Kay Mendoza failed and refused to complete them." Consequently, plaintiffs were required to undertake the repairs themselves, at a cost in excess of $2,000.

Plaintiffs applied for a permit for a walk-in cooler for storage of flower inventory; they were informed that certain offices and restrooms on the first and second floors of the Property did not comply with local building codes and ordinances, and that existing fluorescent lighting was not code-compliant. Plaintiffs notified defendants of these deficiencies. "Despite their promises to do so, Defendants failed and refused to make the necessary alterations. [¶] As a result of the failure and refusal of Defendants . . . to effect

the necessary repairs required by the City, Plaintiffs were unable to procure a permit for operation of their walk-in cooler, without which they could not do business as a flower shop."

By letter dated October 4, 2005, the City of Long Beach denied plaintiffs a business license "due to noncompliance with applicable laws and regulations." By that time, plaintiffs had fallen behind in the rent, and had vacated the premises on September 21, 2005. On that date, defendant Kay Mendoza filed an Unlawful Detainer action. That action resulted in a default judgment against plaintiffs entered on September 7, 2006 in the amount of $9,201.23.

On June 6, 2006, plaintiffs filed a Small Claims action against Kay Mendoza for return of their $5,000 security deposit. A $5,000 judgment was entered in plaintiffs' favor, which judgment was affirmed after trial de novo following Ms. Mendoza's appeal.

Subsequently, the Small Claims Court ordered that plaintiffs' $5,000 Small Claims judgment be applied against Ms. Mendoza's $9,201.23 Unlawful Detainer judgment, resulting in the full satisfaction of former judgment, and the partial satisfaction of the latter judgment.

Plaintiffs served the instant lawsuit on defendants on March 8, 2007, alleging causes of action for breach of commercial lease agreement, fraud, negligence, breach of warranty, and money had and received. Plaintiffs sought to recover their lost profits on account of their inability to secure a business license based on the Property's noncompliance with code requirements, the value of the walk-in cooler which they were unable to resell at its fair market value, and punitive damages. Defendants were served with the complaint on March 9, 2007, and retained the law firm of Do Phu & Anh Tuan, APLC (the "Do Phu firm") to represent them in this action. Ethan Ysais of that firm was the attorney in charge of the case.

The Do Phu firm failed to timely file an answer to the complaint, and defendants' default was entered on May 3, 2007. On August 1, 2007, the Do Phu firm filed a motion to set aside the default based on their mistake, inadvertence or excusable neglect pursuant to Code of Civil Procedure section 473, subdivision (b). As the motion was timely filed

and accompanied by an attorney's affidavit of fault together with the defendants' proposed answer, it would appear that defendants were entitled to relief from default pursuant to the statute.

Due to a series of errors in which all of the participants herein played a part but which are irrelevant to the merits of this appeal and therefore are not detailed here, the trial court denied the motion. Defendants timely appealed that ruling.

Code of Civil Procedure section 473, subdivision (b) (hereafter, section 473) provides that a defendant against whom a default has been entered may move the trial court to set aside the default under two discrete scenarios: (1) the trial court may, in the exercise of its discretion, set aside the default if it determines that the default was taken against the defendant as a result of the mistake, inadvertence, surprise, or excusable neglect of either the party or his or her legal representative; and (2) "the court shall" set aside the default if, within the prescribed time frame, the application for relief "is accompanied by an attorney's sworn affidavit attesting to his or her mistake, inadvertence, surprise, or neglect . . . unless the court finds that the default . . . was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect. . . ." The first scenario may be described as "discretionary relief" while the second may properly be referred to as "mandatory relief" or relief based on "attorney fault."

Mandatory relief, as the name implies, permits no exercise of discretion. "If the prerequisites for the application of the mandatory relief provision of section 473, subdivision (b) exist, the trial court does not have discretion to refuse relief. (*Leader v. Health Industries of America, Inc*. [(2001)] 89 Cal.App.4th 603, 612.) Where, as here, the applicability of the mandatory relief provision does not turn on disputed facts and presents a pure question of law, our review is de novo. (*Ibid*.)" (*SJP Ltd. Partnership v. City of Los Angeles* (2006) 136 Cal.App.4th 511, 516.)

In their opposition to the motion to set aside the default, plaintiffs argued that "Relief from default is discretionary and must be based upon a showing of mistake, inadvertence, surprise or excusable neglect." Plaintiffs contended "Here, the defendants have not offered an item of admissible evidence to support their claim of inadvertence."

As should be apparent from the foregoing discussion of Code of Civil Procedure section 473, subdivision (b), plaintiffs are mistaken in their contention that relief from default under the circumstances of this case is discretionary. Defendants' motion was accompanied by the declaration of Mr. Ysais, who stated: "2. In an[d] around March 2007, I was assigned to prepare, file and serve the responsive pleadings to Plaintiffs' original complaint against Defendants. [¶] 3. Also, in and around March 2007, our firm moved it[]s main office from Fountain Valley to Garden Grove, California. [¶] 4. During the move of our office, due to my mistake, inadvertence and excusable neglect, I failed to calendar the deadline for Defendants' responsive pleadings in this action. [¶] 5. Because of my error, the Court granted Plaintiffs' Request for Entry of Default on or about May 3, 2007."

The statute provides that a motion to set aside a default, when accompanied by the attorney's sworn affidavit of fault, may be denied only if "the court finds that the default . . . was not in fact caused by the attorney's mistake, inadvertence, surprise, or neglect. . . ." (Code Civ. Proc., § 473, subd. (b).) The trial court made no such finding, and indeed, the record is devoid of evidence which would support such a finding. Accordingly, the trial court was required to grant the motion.[1]

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[1]The trial court denied the motion for relief from default due to defendants' failure to file a substitution of attorney with the court. As noted above, however, this is not a valid ground for denial of mandatory relief under section 473, subdivision (b).

DISPOSITION

The order denying defendants' motion to set aside the default is vacated, and the trial court is directed to grant the motion. The parties are to bear their own costs on appeal.

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ARMSTRONG, J.

We concur:

TURNER, P. J.

MOSK, J.